LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
JAN 1 1 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

Mac Q. Williamson, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., *Appellants,* v. Lee Optical of Oklahoma, Inc., a corporation; Ellis Carp, doing business as Douglas Optical; and Oran Rips, *Respondents.*	No. 184
Lee Optical of Oklahoma, Inc., a corporation; Ellis Carp, doing business as Douglas Optical; and Oran Rips, *Appellants,* v. Mac Q. Williamson, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., *Respondents.*	No. 185

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA IN SUPPORT OF THE POSITION OF THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

EDMUND G. BROWN
Attorney General of California

E. G. FUNKE
Assistant Attorney General

DAN KAUFMANN
Deputy Attorney General

Library and Courts Building
Sacramento, California

printed in CALIFORNIA STATE PRINTING OFFICE

TOPICAL INDEX

Page

I. INTEREST OF ATTORNEY GENERAL OF CALIFORNIA IN FILING THIS AMICUS CURIAE BRIEF 1

II. RESUMÉ OF CALIFORNIA LAW WHICH MAY BE AFFECTED BY DECISION 3

III. SELF-TREATMENT IS DISTINGUISHABLE 6

IV. THE FITTING OF FRAMES TO THE FACE CAN BE REGULATED BY STATE LEGISLATION 11

V. CONCLUSION 12

LIST OF AUTHORITIES CITED

CASES

Barsky v. Board of Regents of New York (1954), 347 U. S. 442, 74 S. Ct. 650 12

McNaughton v. Johnson (1916), 242 U. S. 344, 64 S. Ct. 192 5

Railroad Express Agency, Inc., v. People of the State of New York (1948), 336 U. S. 106, 69 S. Ct. 463 8

STATUTES

California Business and Professions Code, Section 2137 3

California Business and Professions Code, Section 2144 7

California Business and Professions Code, Section 2550 ..... 2, 3

California Business and Professions Code, Section 2557 ..... 3, 5

California Business and Professions Code, Section 3019 2

California Business and Professions Code, Section 3041 3

California Business and Professions Code, Section 3042 3

California Business and Professions Code, Section 3043 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

Mac Q. Williamson, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., *Appellants,* v. Lee Optical of Oklahoma, Inc., a corporation; Ellis Carp, doing business as Douglas Optical; and Oran Rips, *Respondents.*	No. 184
Lee Optical of Oklahoma, Inc., a corporation; Ellis Carp, doing business as Douglas Optical; and Oran Rips, *Appellants,* v. Mac Q. Williamson, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., *Respondents.*	No. 185

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA IN SUPPORT OF THE POSITION OF THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

I. INTEREST OF ATTORNEY GENERAL OF CALIFORNIA IN FILING THIS AMICUS CURIAE BRIEF

The opinion of the United States District Court in the above-entitled cause (120 Fed. Supp. 128) contains premises which, if allowed to stand by the Supreme Court, will have an adverse effect upon the efforts of the People of the State of California to protect the health of the citizens of this State in the

field of ophthalmology and optometry. Since 1903 the practice of optometry has been regulated in California, and since 1939, the practice of dispensing opticians has been regulated. The California Board of Optometry has jurisdiction over optometrists (California Business and Professions Code, Section 3010) and the California Board of Medical Examiners has jurisdiction over dispensing opticians (California Business and Professions Code, Section 2550). The Attorney General is legal counsel for both state agencies.

The public policy of this State has been decreed that the practice and profession of furnishing and fitting eyeglasses should be regulated so that the public will be served in this field of health by professionally competent persons who are qualified to treat the public. In this respect, the California Legislature has enacted legislation so that the filling of eyeglass prescriptions, the taking of facial measurements and the fitting and adjusting of lenses and frames are part and parcel of this field of the healing arts.

The effect of the Federal District Court's decision is to reject these concepts and policies, and open this part of the healing arts to commercialism and exploitation without the regulating provisions and safeguards which the State of California submits are essential for the protection of the public health. The Attorney General of this State has heretofore joined in and endorsed the brief filed by the Attorney General of Oklahoma. With the Honorable Supreme

Court's permission, he desires to file this supplemental brief to show the impact of the lower court's decision on California law and this State's concern if that decision is allowed to stand.

II. RESUME OF CALIFORNIA LAW WHICH MAY BE AFFECTED BY DECISION

The Business and Professions Code of the State of California regulates and licenses three separate groups of persons engaged in the examination of eyes and the furnishing of eyeglasses to the public to wit: (1) licensed optometrists who examine eyes and who customarily also directly sell and dispense the prescribed eyeglasses but who are not licensed as physicians and surgeons; (2) licensed physicians and surgeons specializing in the treatment and examination of eyes and who, although not forbidden to do so by law, customarily do not sell and dispense eyeglasses to their patients; (3) registered dispensing opticians who in connection with the filling of prescriptions issued by physicians and surgeons are authorized to engage in "taking facial measurements and fitting and adjusting lenses or frames." (California Business and Professions Code, Section 2550.)*

* Sec. 2550. "Individuals and firms filling prescriptions of physicians and surgeons licensed by the Board of Medical Examiners for ophthalmic lenses and kindred products, and, as incidental to the filling of such prescriptions, taking facial measurements and fitting and adjusting lenses or frames, shall be known as dispensing opticians and shall not engage in such business unless registered with the Board of Medical Examiners."

The definition of the practice of optometry set forth in the California Business and Professions Code not only embraces the activity of making a refraction of the eye for the purpose of determining vision but includes also the separable activity of "the adaptation of lenses or frames for the aid thereof." (California Business and Professions Code, Section 3041.)** Physicians and surgeons under the broad general provisions of California law defining the practice of medicine are also licensed to adapt lenses and frames to the eye. (California Business and Professions Code, Sections 2137, 2557 and 3042.)

Thus, the provisions of California law dealing with visual eye care expressly provide that the adaptation of lenses and frames to the eye is a licensed activity entirely separable from the licensed activity of mak ing an eye examination. Only duly licensed persons may adapt and fit lenses to the eye to wit: optometrists, physicians and surgeons, and dispensing opticians.

** Sec. 3041. "The practice of optometry is the doing, without the use of drugs, of any or all of the following acts, either singly or in combination with others:

(a) The measurement of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof.

(b) The prescribing or directing the use of, or using, any optical device in connection with ocular exercises, visual training, vision training, or orthoptics.

(c) The prescribing of contact lenses for, or the fitting or adaptation of contact lenses to, the human eye."

The California laws require that each of said licensed persons must conform with prescribed standards of experience and knowledge in order to be licensed. The laws of California thus recognize that the separable activity of adapting lenses and frames to the eye is a function materially affecting the public health and welfare and, therefore, may be justifiably regulated and licensed (See *McNaughton* v. *Johnson* (1916), 242 U. S. 344, 64 S. Ct. 192.)

The adaptation of lenses and frames to the eye requires the measurement of pupilliary distances; measurement of the distances between the pupils of the two eyes so that the pupil of each eye is properly aligned to the center of each lens, fixed ir the frame. The over-all activities of adapting the lenses and frame to the eye, together with the furnishing and selling the glasses is known as dispensing eyeglasses.

Under California law the registered. dispensing optician may use his skill and judgment in adapting the lenses to the eye. The law does not require and the prescription rarely provides any specifications regarding the adaptation of the lenses and frames to the eye.

It is all important to note, however, that while the California laws provide that any person engaging in the practice of adapting lenses and frames to the eye must be licensed, the California laws do not regulate or license or "prohibit the sale of complete ready-to-wear eyeglasses as merchandise." (California Business and Professions Code, Sections 2557 and 3043.)

Thus, retail stores may sell complete eyeglasses with corrected lenses under circumstances where the customer selects the eyeglasses and where no unlicensed person in connection with the sale engages in the activity of adapting lenses or frames to the eye.

The opinion of the Federal District Court contains statements which may be construed as holding that legislation regulating and licensing persons engaged in the activity of adapting lenses and frames to the eye, similar to that found in the California statutes, is invalid in the following respects: (1) that any such legislation is invalid which at the same time exempts from regulation or licensing, sellers of ready-to-wear eyeglasses; (2) that the activity of adapting lenses and frames to the eye may not be regulated or licensed because the activity is not clothed with a public interest.

III. SELF-TREATMENT IS DISTINGUISHABLE

The opinion of the district court states:

> "In addition, and of even more significance, is the fact that section 3 exempts from regulation all sellers of ready-to-wear glasses, even though such sellers, from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by 'fitters and sellers of frames' and 'duplicators of lenses and entire spectacles.'
>
> "In the instant legislation not only is the 'relation to the object of the legislation' questionable (as previously discussed) but 'all persons similarly circumstanced' pointedly have not been treated

alike. Persons who sell frames (incidentally adapting and fitting the completed spectacles to the face), persons who duplicate original eyeglasses and market the duplicated spectacles, and persons who sell ready-to-wear glasses are identically situated; that is, all are sellers of merchandise which is not immediately connected with or supervised by a professional eye examiner. Yet the public health and welfare is touched in the same manner and degree by each of these groups inasmuch as the possible result is exactly the same; people may wear spectacles which are not best suited for their eyes." (120 Fed. Supp. at pp. 138-139.)

The district court has failed to properly discern the important distinctions involved where eyeglasses are purchased in a retail store and where eyeglasses are procured from a third person engaged in dispensing eyeglasses.

In both cases there is a sale of merchandise. However, in the one case a third person in the pursuit of an occupation or calling adapts the lenses and frames to the eye. In the other case the person purchasing the glasses, personally adapts the lenses and frames to his eyes—if it can be said there is any adaptation in that case—without the intervention of any third person. In this latter case there is no reliance upon the competence of another person.

The California Medical Act specifically exempts from its provisions "the domestic administration of family remedies." (California Business and Professions Code, Section 2144.) Surely it cannot be seri-

ously contended that the laws regulating and licensing a physician and surgeon are invalid because a patient may engage in the same activity for himself and without any regulation. Regulatory laws are replete with instances where an occupation or calling is licensed but the performance of the same activity in one's own behalf is entirely exempt from regulation. Considerations of public interest are entirely different in the one case than in the other.

Furthermore, and even if it could be said that any public interest exists in regulating the activity of persons who sell eyeglasses under circumstances where the purchasers themselves adapt the lenses and frames to their eyes, the absence of regulation under such circumstances is not justifiable grounds for invalidating legislation licensing persons engaged in the calling of adapting lenses and frames to the eye. Aside from the obvious distinctions which exist, the Legislature may validly regulate one type of activity without being required to occupy by regulation, a related activity.

Application of this principle was clearly expressed by the Supreme Court in *Railroad Express Agency, Inc.* v. *People of the State of New York* (1948), 336 U. S. 106, 69 S. Ct. 463.

In that case a regulation of the City of New York prohibited advertising on vehicles in the city streets but permitted the placing of business notices upon business delivery vehicles so long as such vehicles are engaged in the usual business or regular work of the owner and not used mainly for advertising. The Rail-

way Express Agency challenged the regulation in connection with the sale by it of advertising space to third persons on the exterior sides of its trucks. In upholding the validity of the regulation the Supreme Court said:

> "The question of equal protection of the laws is pressed more strenuously on us. It is pointed out that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet, the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.
>
> "That, however, is a superficial way of analyzing the problem, even if we assume that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is

not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

"We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection.

"It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. *Patasone* v. *Pennsylvania,* 232 US 138, 144, 58 L ed 539, 543, 34 S Ct 381; *Marcus Brown Holding Co.* v. *Feldman,* 256 US 170, 198, 199, 65 L ed 877, 888, 41 S Ct 465; *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 US 580, 585, 586, 79 L ed 1070, 1073, 55 S Ct 538.

"And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. *Central Lumber Co.* v. *South Dakota,* 226 US 157, 160, 57 L ed 164, 169, 33 S Ct 66."

IV. THE FITTING OF FRAMES TO THE FACE CAN BE REGULATED BY STATE LEGISLATION

The opinion of the district court states:

> "The evidence indicates, almost without variance, that written prescriptions issued by the professional examiner contain no directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer. In addition, the Court is satisfied that the mere fitting of frames to the face, where the old lenses are available, is in reality only an incident to what fundamentally is a merchandising transaction, that is, the sale of a pair of frames; and, in any event, the knowledge necessary to perform these services is strictly artisan in character and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist." (120 Fed. Supp. at p. 135.)

Here again the court fails to properly distinguish the separable activities involved. The physical task of duplicating a lens without contacting the patient is one thing. The activity of adapting the lenses and frame to the eyes and face of the wearer is an entirely different operation.

The duplication of the lens is a mechanical shop operation. The adaptation of the lenses and frame to the eye is an activity in the pursuit of a calling involving personal contact with the patient. Proper performance of the function requires skill and judgment and additionally so because the prescription

does not specify any particulars regarding the adaptation. The contact with the patient relates to a part of the human body—the eye—which from a utilitarian standpoint is commonly regarded as the most important of all.

State legislation providing that only licensed persons with prescribed qualifications may engage in the calling of adapting lenses and frames to the eye is legislation in the public interest in that the public health and welfare is involved. The term health in its broadest sense relates to all matters pertaining to the well-being, personal comfort and soundness of the human body.

Public health in all its aspects is a paramount subject for the exercise of the police power by the State, *Barsky* v. *Board of Regents of New York* (1954), 347 U. S. 442, 74 S. Ct. 650.

> "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health." (P. 449.)

V. CONCLUSION

The Attorney General of the State of California respectfully submits the holding of the federal district court in the instant case declaring certain portions of the Oklahoma statute regulating visual care unconstitutional is erroneous; that state legislation

regulating and licensing persons engaged in fitting and adapting lenses to the eyes is valid even though it exempts sellers of ready-to-wear eyeglasses; and that the calling of adapting lenses and frames to the eyes may be regulated or licensed because the activity is directly within the field of the protection of public health and welfare.

Respectfully submitted,

EDMUND G. BROWN
Attorney General of California

E. G. FUNKE
Assistant Attorney General

DAN KAUFMANN
Deputy Attorney General

o